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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 800

CROWN ZELLERBACH CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals affirming the order of the Federal Trade Commission (Pet. A9–A75) and denying rehearing (Pet. A76–A82) are reported at 296 F. 2d 800 and 834, respectively. The opinions and orders of the Federal Trade Commission (R. 36–51, 547–600, 603–623)[1] are reported at 51 F.T.C. 1105 and 54 F.T.C. 769, 798.

[1] References to the record in the court of appeals are designated as "R". The exhibits introduced by the Commission and petitioner in the court of appeals are referred to as "CX" and "RX", respectively. Reference to an exhibit is followed by the number of the volume of the record in which it is printed (in Roman numerals) and the page on which it is located, *e.g.*, CX 168c, R. XIII–4051.

JURISDICTION

The opinion of the court of appeals affirming the Commission's order was issued on June 5, 1961 (Pet. A9), rehearing was denied on December 22, 1961 (Pet. A76), and the court entered final judgment on January 29, 1962 (Pet. A83). The petition for a writ of certiorari was filed on March 16, 1962. The jurisdiction of this Court is invoked under 15 U.S.C. 21 and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on review of a Federal Trade Commission proceeding to determine whether there had been a violation of Section 7 of the Clayton Act, a court of appeals which "in no manner disapproved or rejected the Commission's bases for its decision" committed error by reinforcing the conclusions of the Commission with its own parallel conclusions on the basis of the record before it.

2. Whether the court of appeals erred in holding that it was harmless error for the Federal Trade Commission to have received in evidence a survey upon which it did not rely in reaching its decision.

3. Whether the Commission abused its discretion to formulate appropriate relief by requiring Crown (a) to divest St. Helens as a competitive entity in substantially its operating form at the time of the acquisition, and (b) to include, as part of the property to be divested, St. Helens' timberlands.

STATUTES INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended by 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

The petition seeks review of a judgment of the court of appeals affirming a decision of the Federal Trade Commission that the acquisition in 1953 by Crown Zellerbach Corp. ("Crown") of the St. Helens Pulp & Paper Co. ("St. Helens") violated Section 7 of the Clayton Act, 15 U.S.C. 18. The Commission's order, which the court affirmed, required Crown to divest itself of all the assets, properties, rights and privileges that it obtained as a result of the merger, together with so much of the improvements made at the acquired plant as may be necessary to restore St. Helens as a competitive entity. The pertinent facts are as follows:

1. THE COMPANIES INVOLVED

Crown. Crown, in 1953, before the merger, was the largest pulp and paper manufacturing company in the

Western states[2] and one of the largest in the entire United States (R. 421, 549). Its production facilities consisted primarily of five mills in Washington and Oregon which had a combined capacity for making 2,165 tons of paper a day (R. 550–51; CX 4, R. I–1741–42). These mills produced paper in each of the three industry-recognized categories, *i.e.*, newsprint, fine paper and coarse papers (Pet. 10; R. 557–58).[3]

The trade category of coarse papers consists of various types of papers which have been grouped and classified by the Census Bureau.[4] Included in the Census category of coarse papers are wrapping, shipping-sack, bag, envelope, gumming, waxing and other converting papers (Pet. A14; RX 62 pp. 38–42 (separately bound)), which collectively constituted about 50% of Crown's total production of trade coarse papers (R. 614; RX 62, pp. 28–33). In 1953, Crown's production in the Census category of coarse papers amounted to 51.5% of the total of such papers produced in the West (Pet. 12; R. 573–74). Of its total

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[2] For the purposes of this proceeding, the Western states include the three Pacific Coast states of California, Oregon and Washington, and the eight Mountain states of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming (R. 609 n.4).

[3] Since "St. Helens did not produce newsprint or fine paper" petitioner has "agreed that these products are not relevant here" (Pet. 11).

[4] The Census breakdown of trade coarse papers consists of the following classifications: coarse paper (called below "Census coarse paper"), special industrial paper, sanitary tissue stock, tissue paper, container board, bending board, nonbending board, special paperboard stock and cardboard (Pet. A14).

domestic sales of these products, from 80% to 85% were made in the West (R. 579, 612, 1568–69; CX 36, R. IV–2277–2318), with the great bulk concentrated in the three Pacific states (R. 579–80, 612; CX 36, R. IV–2277–2318).

Crown is also engaged in the manufacture of many converted paper products and uses a substantial portion of the paper it produces in such converting operations (R. 551, 1582, 1800–01; CX 4, R. I–1735). For example, Crown converted more than 70% of its total production of bag paper into manufactured bags (CX 36–Z, R. IV–2307–08; RX 62, pp. 28–29) and it sold about 55,955 tons of bags in the West during 1952 (CX 167, R. XIII–4047; see Chart C facing Pet. A39). Through its wholly owned jobber subsidiary, Zellerbach Paper Co. ("Zellerbach"), Crown was one of the largest merchandisers of paper products in the Western states (R. 554, 1924; CX 167, R. XIII–4045–48). Crown therefore competed both with independent converters, and with independent jobbers at retail (R. 591, 616, 1360–61, 1428–29, 2444). In addition, Crown owned or controlled extensive forest lands in the United States (500,000 acres in Oregon and Washington (R. 552; CX 4, R. I–1740)) and Canada (920,000 acres (R. 553; CX 12, R. III–2039)).[3]

[3] In 1953, Crown also owned or controlled several Canadian corporations engaged in the manufacture of pulp, paper and paper products (R. 553–54; CX 4, R. I–1735, 1743–44), and during the pendency of this action acquired the fully integrated Gaylord Container Corp. which operates throughout the Southwest, South and East (R. 555; see CX 183, R. XIII–4097–98). It was then also preparing for production in a California mill which had a potential capacity of 310 tons per day (Pet. A11; R. 551). Up to 1956, Crown also owned

St. Helens. The acquired company, St. Helens, was the third largest manufacturer of Census coarse papers in the West; in 1953, it had 11% of the total Western production (Pet. 12; R. 574). Its mill, located in Oregon, had a daily capacity of 180 tons (Pet. 7; R. 558), and at the time of the merger St. Helens was engaged in an extensive modernization and expansion program (which it began in 1948) designed to increase its capacity and modernize its facilities (R. 559–61; CX 51, R. VII–2835–37).[6] St. Helens' entire production was of trade coarse papers, 84% of which fell into the Census category of coarse papers (R. 573; RX 62, pp. 28–33). Of its total domestic sales, 85% were made in the eleven Western states (R. 580, 612; 2018–19; CX 56, R. VII–2865–71), with the vast majority concentrated in the three Pacific states (*ibid.*). St. Helens converted only an insignificant portion of its production of coarse papers other than bag paper[7] (R. 2007) and was the

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50% of the voting stock of Fiberboard Products, Inc., a large Western manufacturer of paper products (R. 421, 554–55).

[6] St. Helens was a fully integrated company owning, in addition to its mill, 117,000 acres of timberland in Oregon and Washington (R. 558; CX 4, R. I–1755). It sold its paper through its exclusive sales agency, the Graham Paper Co. (*ibid.*).

[7] St. Helens converted the greater part of its production of bag paper (R. 2037, 2043–49; CX 117, R. XVIII–XIX) and ranked second among Western producers in sales of manufactured bags (Chart C facing Pet. A39). This large-scale converting operation was in part necessitated by the fact that the only nonintegrated grocery bag manufacturer in the West, Los Angeles Paper Bag Co., purchased its bag paper almost exclusively from Crown (R. 1471; see R. 1473, 1480–81) and made only infrequent spot purchases from St. Helens (R. 2557–58).

only substantial non-competing supplier, of coarse wrapping paper to independent Western jobbers (*e.g.*, R. 1429, 1752, 2451, 2612) and of shipping-sack, envelope, gumming and waxing papers to independent Western converters (*e.g.*, R. 1411–12, 1460–63, 2126–27, 2542–43, 2574–75).

The Merged Company. In 1953, as above stated, Crown accounted for 51.5% of the Census coarse papers manufactured in the West and St. Helens, 11.0%; together they had 62.5%. In 1954, after the merger, the share of Crown (including St. Helens) increased to 64%, 53.2% attributable to Crown's facilities and 10.8% to St. Helens' (R. 577; CX 168c, R. XIII–4051). Crown (including St. Helens) was by far the dominant paper company in the West. Of the remaining 36%, Longview Fibre Co. produced 17.6%, St. Regis Paper Co. contributed 12.3%, and six firms shared the remaining 6.1% (*ibid.*). Moreover, the merged company's predominance in the production of several of the various types of papers constituting the Census coarse paper line was even greater. As an illustration, in 1954 it manufactured 77.6% of the total Western production of wrapping paper with the remaining 22.4% divided among 7 producers (CX 168c, R. XIII–4051), the largest of which, Longview (12.5%), sold to only three specific jobbers (R. 578, 1381–96, 1752–54).*

*Of the remaining Census coarse papers, Crown (including St. Helens) produced 78.9% of the total Western production of bag paper; 89.5% of the production of waxing paper; 87.7% of the production of gumming paper, with Longview contributing the remaining 12.3% (CX 168c, R. XIII–4051). In addition, the merged company produced 51.7% of the total Western production of envelope paper with 45.3% of the re-

2. THE DECISIONS BELOW

The Commission's Decision. In his initial decision, after extensively analyzing the statistical and testimonial evidence in the record and making preliminary findings of fact (see R. 548–86), the hearing examiner concluded that the merger of Crown and St. Helens violated Section 7 (R. 598) and ordered divestiture (R. 598–600).[9]

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mainder manufactured by Columbia River Paper Co. (*ibid.*), whose product was made by a different process and was not fully competitive with Crown's (R. 2051). Crown was also a substantial producer of shipping-sack paper; its 37% of the total production market in 1954 ranked second only to St. Regis and was 10% greater than its 1952 market share (compare CX 168a, R. XIII–4049 with CX 168c, R. XIII–4051).

[9] During the hearing, counsel supporting the complaint offered in evidence a tabulation of the replies of Western jobbers and converters to survey questionnaires sent to them by the Commission pursuant to Section 6 of the Federal Trade Commission Act, 15 U.S.C. 56 (R. 583–84). The hearing examiner sustained objections to this document on the ground that the information contained therein had not been made available to petitioner for use on cross-examination (R. 584). An interlocutory appeal was taken to the Commission, which held that "the basic information collected * * * and the work papers used in compiling the Survey * * * shall be made available to [Crown] and its counsel, at such reasonable times and places as may be determined by the hearing examiner" (R. 50), except that "[n]o information * * * that can be identified with reporting companies shall be admitted into the public record" (*ibid.*). The survey tabulation (CX 176), but not any of the answers to the questionnaires, was introduced in evidence (R. 585–86). However, all of the answers and work papers, except an analysis of Longview's sales operations (see p. 27, *infra*), were turned over to petitioner (R. 943–44, 967–72). "[I]n making [his] decision," the examiner gave "no consideration" to the survey tabulation, and the Commission disclaimed reliance thereon (R. 620).

The Commission affirmed the examiner. The various papers falling within the Census category of coarse papers were held to constitute the appropriate line of commerce in which to test the effect of the merger (R. 611–12). The appropriate section of the country was found to be the eleven Western states (R. 613). In addition, the Commission considered the evidence "sufficient to show that the three Pacific Coast States * * * [likewise] constitute a section of the country" (R. 613). The Commission found that shipping costs and other factors effectively separated the West as a competitive area and that producers from outside the area sold there a "relatively insignificant" amount of product-line papers and were "generally unreliable sources" of supply (R. 613, 616).

Turning to the effect upon competition, the Commission found: First, that the merger eliminated "an important, fully integrated competitor having its own timber reserves, pulp manufacturing and converting facilities and fully developed sales outlet to the trade" (R. 615). Second, that the merger "increase[d] significantly the size of [Crown] in the relevant line of commerce in which it already had a commanding lead" (R. 615–16). Third, that elimination of St. Helens severely restricted the sources of supply available to Western jobbers and converters and compelled many of them to rely upon their competitor, Crown, thus "additionally enhanc[ing]" Crown's position (R. 616–17).[10] The Commission concluded that

[10] The Commission further found that the lessening of competition would not be offset by new entrants into the market or by shifts into production of coarse papers by firms having

the effect of the merger "may be substantially to lessen competition or tend to create a monopoly in the relevant line of commerce and, as such, is in violation of Section 7 of the Clayton Act" (R. 618–19). Crown was ordered to divest itself "of all assets, properties, rights and privileges, including * * * timberlands, cutting rights [and] timber" that it obtained as a result of its acquisition of St. Helens, and of so much of the improvements it had added to the St. Helens plant as may be necessary to restore it "as a competitive entity in the paper trade, as organized and in substantially the basic operating form it existed at or around the time of the acquisition" (R. 603–04), and to submit a plan for compliance (R. 605).

The Decision of the Court of Appeals. On review, the Court of Appeals for the Ninth Circuit unanimously affirmed (Pet. A9, A70). Stating that "on its facts [this] is not a close [case]" (Pet. A57–A58), the court held:

> Crown, with its leadership in production and sales of the product-line papers, its great disparity in size as compared with other competitors in the area, and its position as a price leader in the market, was already in a dominant position before the merger. Its acquisition of St. Helens could not help but substantially increase that dominance. It significantly added to its concentration of power.

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machines technically adaptable to it (R. 617–18); and that St. Helens was not a failing company, the acquisition of which might be permissible under *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291 (R. 619–20).

While "[t]his alone justified the Commission's finding" of violation, the court pointed out that the decision was further supported by specific "practical effects" of the elimination of St. Helens (Pet. A58). It noted St. Helens' important position as a supplier of independent jobbers and converters, who were now under the "competitive disadvantage" of having to buy from a competitor, Crown (Pet. A59–A61), and some of whom had already been harmed by Crown's denial of certain services (Pet. A61–A63).

The court fully considered and rejected petitioner's objections to the Commission's subsidiary findings with respect to the market shares held by Crown and its competitors. The court focused on the three Pacific Coast states as the relevant geographic market, noting that the Commission had found this to be an alternative market (Pet. A33–A37, A68–A69). While holding that the Commission's finding as to the relevant product market was supported by the record (Pet. A26) and that Census coarse papers "collectively may properly identify the relevant market here involved" (Pet. A30), the court added to that market "manufactured bags" (Pet. A31)—the only converted product that St. Helens sold in substantial amounts (Pet. A21 n. 6). Responding to Crown's argument that the Commission had improperly relied on statistics of production rather than sales within the area, the court examined the sales data in the record (Pet. A20–A22, A36–A45) and concluded that in 1952, before the merger, Crown sold about 50.5% of the Census coarse papers plus manu-

factured bags purchased in the Pacific states and St. Helens sold about 10.81% (Pet. A45).[11] The court ruled that "the evidence of increased dominance and concentration" would bear out the Commission's decision with or without its "minor alteration" of the product market, and that the impact on the Pacific coast market was consistent with the Commission's finding of violation in a larger area. It held that there was "no occasion here to remand for further findings" by the Commission (Pet. A68, A70).[12]

Crown's petition for rehearing was denied (Pet. A76–A82). The court held that *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, did not require remand, for while the court's prior opinion had supplied statistics from the record, these "reinforced and supported the Commission's findings" and the court had "in no manner disapproved or rejected the Commission's bases for its decision" (Pet. A77). The court stressed that "we were but adopting and reenforcing the *ratio decidendi* of the Commission" (Pet. A78).

The Ninth Circuit reaffirmed the correctness of the sales statistics on which it relied in testing the Com-

[11] See n. 10, *infra*, p. 20.

[12] The court also held that the receipt in evidence of a market survey did not deny Crown a fair hearing and was "no more than harmless error", since the survey was not relied upon by the hearing examiner or the Commission, and was likewise "disregarded" by the court (Pet. A64–A66). See n. 9, *supra*. The court further sustained the Commission's rulings that the anticompetitive impact of the merger was not lessened by the prospect of new entrants and that St. Helens was not a failing company. See n. 10, *supra*.

mission's conclusions, finding them "substantially correct" (Pet. A79). Moreover, it held (Pet A81):

> The fact is that no combination of figures of production or sales found in the record can possibly modify or alter the basic findings of the Commission and of this court that prior to the merger Crown's position in the market was a dominant one; and that after it had absorbed St. Helens, which was practically the only real and substantial producer in a position to compete with Crown, all up and down the line, Crown's dominance of the market became overwhelming.

ARGUMENT

The 68-page petition submitted by Crown presents no substantial question warranting further review by this Court. As the Ninth Circuit stated, this is not a close case (Pet. A57). Petitioner does not even dispute the basic holding of both the court of appeals and the Commission that Section 7 of the Clayton Act is violated when the dominant firm in a market acquires one of its few substantial competitors, with the consequences here shown.

Rather, the petition is devoted to a dissection of subsidiary findings and computations in an effort to find inconsistencies between the market analyses of the court and Commission. As we shall show, these market analyses are consistent and, in any event, the minor variations in approach do not detract from the findings and reasoning common to both decisions below, which are sufficient to invalidate the merger. The court of appeals was clearly correct in affirming

and refusing to remand the case. The remaining questions presented in the petition, concerning the receipt in evidence of a market survey and the scope of relief, are likewise insubstantial, and were correctly resolved below.

1. Under Section 7 of the Clayton Act as amended in 1950, the merger of Crown and St. Helens is invalid if its effect "may be substantially to lessen competition, or to tend to create a monopoly." Congress clearly intended that a merger or consolidation would be struck down under Section 7 of the Clayton Act well before it would violate the Sherman Act. See S. Rep. No. 1775, 81st Cong., 2d Sess., pp. 4–5. To achieve that objective, Congress made a merger illegal when it results in one of the following proscribed consequences listed in the House Report:

> elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.

H. Rep. No. 1191, 81st Cong., 1st Sess., p. 8. See *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y.); *United States* v. *Koppers Co., Inc.*, 1962 Trade Regulation Reporter ¶ 70, 194 (W.D. Pa.).

The instant case presents the most straightforward situation for implementation of the Congressional

policy—the acquisition by a leading firm of one of its few substantial competitors in an oligopolistic market. See Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 276–283, 299–308. Both the court of appeals and the Commission unequivocally held that Crown occupied the "dominant" position, with a "commanding lead" over its rivals in the Western market (Pet. A58, A81, R. 615), and that St. Helens was an important competitor, the third largest company in a market containing only four substantial competitors (including Crown and St. Helens) and six firms with insignificant market shares (Pet. A45, A58, A81; R. 614–15).

These facts alone, as the Ninth Circuit held (Pet. A58), justified a finding of violation, since the merger clearly eliminated "a substantial factor" and seriously increased the "relative size" of the dominant firm (H. Rep. 1191, *supra*). Moreover, both the court of appeals and the Commission found that St. Helens had been particularly important as a non-integrated supplier to independent jobbers and converters. It was "practically the only real and substantial producer in a position to compete with Crown, all up and down the line" (Pet. A81, A59–A61; R. 616–17). By the merger, the independents were put under the "competitive disadvantage" of having to rely for supplies upon Crown which was also their major competitor (Pet. A59; R. 616–17); they were "deprive[d] * * * of a fair opportunity to compete" (H. Rep. No. 1191, *supra*).

Contrary to petitioner, therefore, the court of appeals has not "reject[ed] every one of the Commission's main grounds for decision" (Pet. 28), but relied upon the very same reasoning. The decision below is thus consistent with the principle of *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87, that "[t]he grounds upon which an administrative order must be judged are those upon which * * * [it] was based." As the court of appeals itself pointed out, it "in no manner disapproved or rejected the Commission's bases for its decision" (Pet. A77) but "adopt[ed] and reenforc[ed] the *ratio decidendi* of the Commission" (Pet. A78).

2. Petitioner objects, however, to the Ninth Circuit's partial reliance upon its own statistical findings of market shares from the record. The short answer is that, in sustaining the Commission's findings and conclusion, the court did "not necessarily have to sustain the [Commission] on each and every one of its subsidiary findings of fact," so long as the record contains sufficient evidence to support the conclusion. *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 139 (C.A. 1), certiorari denied, 346 U.S. 887; see *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 247. "Remand would be called for only if there were a solid reason to believe that without that subsidiary finding the agency would not have arrived at the conclusion at which it did arrive." *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 67; *National Labor Relations Board* v. *Reed & Prince Manufacturing Co.*, *supra*; *Central*

Mercedita, Inc. v. *National Labor Relations Board*, 288 F. 2d 809, 812 n. 1 (C.A. 1). Clearly remand was not called for here. For, as the Ninth Circuit held, "no combination of figures of production or sales found in this record can possibly modify or alter" the basic findings made by both the court and Commission as to the dominance of Crown and the importance of St. Helens' competition (Pet. A81).

In any event, as the court below explicitly stated, its statistical analysis—which showed virtually the same shares of the market as the Commission's—"reinforced and supported the Commission's findings" (Pet. A77), and did not contradict them. Moreover, both the court's and the Commission's conclusions are supported by consistent findings on each of the three subsidiary issues much argued by petitioner—(a) line of commerce; (b) section of the country; and (c) production and sales data.

(a) *Line of Commerce.* This Court has held that a "line of commerce" under Section 7 can consist of any product or group of products that have sufficient peculiar characteristics and uses and are sufficiently distinct from other commodities, so long as the market affected is substantial. *United States* v. *duPont & Co.*, 353 U.S. 586, 593, 595. Applying this test, the Commission found that the "physical characteristics, markets, prices, and uses" (R. 610) of the Census category of coarse papers viewed collectively established them as "a sufficiently distinct product line to be a 'line of commerce' within the meaning of Section 7" (R. 612). The court of appeals held that this finding "was based upon a

substantial amount of evidence" (Pet. A26) and that Census coarse papers "collectively may properly identify the relevant market here involved" (Pet. A30). However, responding to petitioner's assertion that the relevant market should include "all paper of the type made by St. Helens" (see Pet. 23), the court then examined the situation presented by adding to the market the only additional item that St. Helens "produced and sold in substantial amounts" (Pet. A31, A21)—manufactured bags.

Petitioner argues that in so doing the court "decided that the Commission had misconceived the relevant line of commerce" (Pet. 30), and therefore a remand is necessary. On the contrary, the court made clear when it stated that "the product market here, whether it includes or excludes manufactured bags" constitutes "a distinct and a substantial [market]" (Pet. A24), that it was merely amplifying and not repudiating the product-line selected by the Commission. Furthermore, it is settled that Section 7 is violated "if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce" (*United States* v. *duPont*, *supra*, 353 U.S. at 594–595 n. 13; *Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 253) and that several lines of commerce can properly be selected for the purpose of analyzing the effect of the merger (*United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 595 (S.D.N.Y.)). Here, the court expressly found that "the evidence of increased dominance and concentration which we have noted will bear out the Commis-

sion's findings whether "paper bags are or are not included in the relevant product market" (Pet. A68).[13]

It is also alleged that the court erred in holding that the Commission "need not consider evidence as to the flexibility of production equipment and the interchangeability of products in defining the relevant market" (Pet. 4), and this alleged holding is said to place the present case in conflict with *United States* v. *du Pont & Co.*, 351 U.S. 377 (the *Cellophane* case), and *United States* v. *Columbia Steel Co.*, 334 U.S. 495. While the court did state that a narrower test of product interchangeability was appropriate for Section 7 cases than for the monopolization provisions of the Sherman Act (Pet. A28–A29),[14] it did not rest its definition of the product market on this ground alone. As a totally separate and independent ground for its affirmance, it adopted the Commission's finding that

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[13] The court clearly relied upon the rationale of *United States* v. *duPont & Co.*, *supra*, in defining the market (see Pet. A24, A30) and its references to the substantiality of St. Helens' production of manufactured bags were intended to show that bags constituted a "substantial" market (353 U.S. at 595). The additional products that petitioner would add to the line of commerce were not produced by St. Helens in substantial quantities (Pet. A21; see R. 589–90), are not sufficiently like Census coarse paper to be added to that market and are not sufficiently homogeneous to be viewed collectively (R. 610–11; see Pet. A26).

[14] In support of this view the court correctly relied upon this Court's decision in *United States* v. *du Pont & Co.*, 353 U.S. 586 (the *General Motors* case), and upon *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (Pet. A28–A30). See also Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281, 305–307.

there was no product interchangeability between Census coarse papers and other coarse papers, holding that "the contention of interchangeable or substitutable products here is simply not borne out by the facts" (Pet. A29; see Pet. A15–A16, A26, A30). The Commission had found that "[t]he nature of many papers [which petitioner proposed to add to the product market] indicates that they are unsuitable generally for any purpose other than that for which they are made"; and that papers which perhaps were theoretically interchangeable in use, were not much substituted for each other "in actual practice" (R. 611). See R. 356, 1683, 3007–13, 3821–22, 3837–39. Thus, petitioner's claim of a conflict with the *Cellophane* case disregards not only the different statutory provisions involved but also explicit findings of an absence of that interchangeability of products which was crucial to the *Cellophane* case.

Crown's contention that the present decision authorizes a disregard of the availability of competition to Crown resulting from simple alterations in other paper manufacturers' production equipment and thereby comes into conflict with *United States* v. *Columbia Steel Co.*, 334 U.S. 495, is also wholly without merit. As to the flexibility of production equipment, the Commission found that paper companies "are now engaged in the manufacture of types or grades of paper for which there is a present consumer demand" and for the marketing of which they have developed sales organizations (R. 595, 618) and that "substantial shifts in production" are therefore not to be expected

(R. 618).[12] The Ninth Circuit held petitioner's argument to be "not persuasive here" on the same basis.

Moreover, even without regard to these conclusive determinations of fact, it is apparent that the *Columbia Steel* case involved a question totally different from that presented here. In *Columbia Steel*, the government argued that the purchase of Consolidated Steel Corporation by United States Steel would foreclose a significant market to the competitors of United States Steel who formerly sold rolled steel plates and shapes to Consolidated. The Court held that, in assessing the extent of the purchasing market foreclosed and the consequent harm to sellers, rolled steel products was the appropriate market since "[i]n this case and on this record" Consolidated's former suppliers of rolled steel plates and shapes could easily shift their production and sell different rolled steel products to other consumers. 334 U.S. at 511.

The vice of the instant case is not that it foreclosed the market in which St. Helens purchased. The merger eliminated one of four major competitive sellers from the market available to buyers of coarse papers. This difference has great significance, for while there is every reason to assume that a producer will make any readily available changes in his method of production which are necessary to compensate for a

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[12] In the instant case, the record conclusively establishes that suppliers of products other than Census coarse papers will not substantially shift their production to serve the former customers of St. Helens (see *e.g.*, R. 1414, 1693, 1770, 2126–27, 2250, 2555–56). See *United States* v. *Bethlehem Steel Corp.*, *supra*, 168 F. Supp. at 592–593 n. 34.

lost purchasing market, there is absolutely no reason to assume that paper manufacturers, which did not see fit to compete with Crown and St. Helens when they were separate entities, would change their method of production in order to compete with a new, more powerful Crown-St. Helens combination.

(b) *Section of the Country.*—A "section of the country" may be taken as the geographic market for purposes of Section 7 if it is an "area of effective competition" (S. Rep. No. 1775, 81st Cong., 2d Sess., p. 6, quoting *Standard Oil Co.* v. *United States*, 337 U.S. 293, 299 n. 5).[18] In the instant case, the Commission concluded that the eleven Western states constituted the appropriate section of the country in which to test the effect of the merger on the basis of findings that both St. Helens and Crown made over 80% of their sales of product-line papers in the eleven Western states and that producers from outside the area sold "relatively insignificant" amounts of such papers in the West and were "generally unreliable sources" of supply (R. 612–13, 616). In addition, the Commission, noting that the "great bulk" of the sales by Crown and St. Helens were in California, Oregon and Washington, held that "[t]he evidence is likewise sufficient to show that the three Pacific Coast States * * * constitute a section of the country, within the meaning of Section 7" (R. 613).

[18] The Senate Report continued, that the appropriate geographic market may be one which includes an "appreciable segment of the trade" or "which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country." S. Rep. No. 1775, p. 6, *supra*.

The court of appeals pointed out that the Commission considered the Pacific states an alternative market (Pet. A33–A34, A68–A69). It also noted that "the most active and extensive competition" between Crown and St. Helens occurred in that area, and that the three-state market was "the area which could be best served and supplied by these producers" and was "subject to common economic forces * * * which set it apart" (Pet. A35). Accordingly, it considered the Pacific Coast states as the market within which to measure Crown's and St. Helens' market position (Pet. A34–A36).

The findings of the court and Commission are consistent, since both recognized the propriety of the Pacific Coast states as a "section of the country" under Section 7. Moreover, since the western consumption of the paper products here involved is very heavily concentrated in the Pacific states (see RX 80, RX 82 (separately bound)), there is no reason to believe that there would be any significant variation in market shares between the two relevant areas discussed by the Commission and the court.[17] Petitioner

[17] There is no conflict, therefore, with *Eric Sand and Gravel Co. v. Federal Trade Commission*, 291 F. 2d 279 (C.A. 3), as alleged by petitioner (Pet. 38–40). In that case, the Commission had not made any findings concerning the geographical market which the court deemed relevant and the modification of the area had an obviously drastic effect upon the market shares of the merging companies. Remand was therefore necessary to obtain the Commission's view on the effect of the merger in the new market. Here, as already stated, the Commission has indicated that the Pacific states constitutes an appropriate area, and there is no resulting change in the market shares upon which the Commission rested its finding

makes no suggestion that there is any difference (see Pet. 28, 30–31, 34, 38–40) and the opposite is demonstrated by the findings of market shares below (*infra*, pp. 7, 11).[18]

(*c*) *Production and Sales Statistics.* Petitioner asserts as error that the court below relied upon statistics of sales in the regional market, while the Commission had utilized production data to show market shares (Pet. 28, 31). However, the Commission had made its analysis on the basis of findings that the western market was "in relative isolation" (R. 615), that Crown and St. Helens, for example, sold the great majority of their product in that market (R. 613), and that sales in the area by producers

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of a violation of Section 7. Nor is there a conflict with either of two more recent Third Circuit opinions. In *Scott Paper Co.* v. *Federal Trade Commission*, 1962 Trade Regulation Reporter ¶ 70, 271, the court remanded to the Commission on the ground that the record did not contain evidence necessary to support the Commission's conclusion. In *A. G. Spaulding & Bros., Inc.* v. *Federal Trade Commission*, *id.*, at ¶ 70, 266, as in this case (see, *e.g.*, Pet. A26), the Commission's order was affirmed as supported by substantial evidence, although the court mentioned in a footnote a difference in views as to whether the standard of review should be verbalized as "substantial evidence" or "clearly erroneous."

[18] Moreover, petitioner has insisted throughout upon as broad a geographic market as possible, and the court below was justified, therefore, in concluding that since the Commission found that the merger violated Section 7 when tested in the eleven Western states, "then *a fortiori* it offends the statute if the more limited three Pacific states area is deemed the relevant market" (Pet. A70). It is settled that a merger is illegal if it has the proscribed effects "in any section of the country." See *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 603, 618–619 (S.D.N.Y.).

located elsewhere were "relatively insignificant" (R. *ibid.*). On that basis, the Western firms' production data obviously bore a direct relation to their relative positions as suppliers to the Western market.

The court below did not overrule the findings or reasoning of the Commission on this point. Indeed, it stressed that "productive capacity" had "substantial bearing" on the existence of a violation, and stated that Crown's "predominance of production" in the Western market, enhanced by the merger, "would appear not only to be a threat to possible competition but to approach a monopoly situation" (Pet. A49; see Pet. A50–A51). The court also found that there was substantial evidence, in the testimony of witnesses, to support the Commission's finding that the imports from outside the Western market were not a significant factor (Pet. A42–A43).

Nevertheless, assuming the validity of petitioner's argument that "sales statistics rather than production figures are generally speaking more significant in arriving at the relevant market" (Pet. A19–A20), the court showed that the merger was also unlawful in the light of statistics on sales in the record. An estimate was made of the sales attributable to producers located outside the market area by use of an Interstate Commerce Commission analysis of a 1% sample of all railway waybills of wrapping paper and bag shipments into the Pacific states during the years 1949 to 1953. The court estimated this figure at its uppermost possible limit, 11.1% of sales (Pet. A39–A45), while recognizing that "there is nothing in the

record to support so high a figure" (Pet. A44).[19] Even this estimate, however, did not dilute Crown's market position achieved by virtue of its production dominance, since the court found that Crown's share of the sales in the Pacific states before the merger was 50.53%, to which the merger added St. Helens' 10.81% (Pet. A45). Statement, *supra*, pp. 7, 11.[20]

3. Petitioner claims that it was denied due process by "the admission into evidence of a purported summary of a secret *ex parte* mail order survey" taken by the Commission (Pet. 53), which "had the result of so permeating the record with distortion and falsehood that a fair trial became impossible" (Pet. 56).

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[19] In computing the sales percentages, the court figured sales in the Pacific states by companies outside the area at a maximum which was almost certainly higher than the actual sales, thus understating Crown's share (Pet. A38–A44). As the court said, the record was "unsatisfactory" and "fragmentary" on these sales and on sales of the smaller western producers (Pet. A38–A39, A45) and it avoided any doubt by using the conservative assumptions which attributed to the two factors 11.1% and 4.02% of sales, respectively.

Petitioner has repeatedly and erroneously cited the court's reference to the "unsatisfactory" and "fragmentary" evidence on these sales as if it referred to the entire record and undermined all statistics (Pet. 26, 32, 33, 53).

[20] While petitioner continues to contest the validity of the court's determination of the relevant shares of market sales, the issue is certainly not one meriting review by this Court. Moreover, any difference in view as to the proper calculation of Crown's and St. Helens' shares of market sales could in no way affect the result of the present case. As the court specifically pointed out, "[e]ven if we were to accept petitioner's revised figures, we would be obliged * * * to reach the * * * conclusion that the acquisition would probably result in a substantial lessening of competition and tend to create a monopoly" (Pet. A79).

The short answer, as the court of appeals held, is that allowing the survey to remain in the record was at most "harmless error" (Pet. A65), because neither the hearing examiner (R. 586), the Commission (R. 620), nor the court (Pet. A65–A66) relied upon it in reaching its decision. See Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009(e), which requires that the reviewing court take "due account" of the "rule of prejudicial error". Petitioner does not create a substantial question by its innuendo that the disavowals of reliance on the survey were less than candid (see Pet. 18, 28, 56–57, 60–62). This Court has held in a converse situation, that "with due regard to the conscientiousness which we must attribute to another branch of the Government, we cannot reject its explicit avowal that it did take into account evidence which it should have considered unless an examination of the whole record puts its acceptance beyond reason." *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 229. Equally the Court should not, without reason, reject the agency's assurance that it disregarded evidence, especially when there is other overwhelming support for its findings.

The facts underlying petitioner's innuendos of an "outrageous" use of *ex parte* surveys and secret communications are summarized in footnote 9, p. 8, *supra*, and in the court's opinion at Pet. A64–A66. It is sufficient for the present to note that all the answers to the questionnaires received by the Commission, correspondence in connection therewith and Commission work papers, except for a sales analysis of the

Longview Paper Co., were all turned over to petitioner during the hearing and it was free to use them in any proper manner (R. 968–69). This was clearly conceded by petitioner's counsel in his argument concerning one remaining questionnaire which was later turned over to petitioner (R. 943–44, 971–72). The sales analysis of the Longview Paper Co. had been used only to check the names of converters and jobbers to whom questionnaires were to be sent, and, therefore, the examiner justifiably concluded that petitioner should not have the unrestricted right to examine it (R. 967–71).

4. Finally, petitioner argues (Pet. 63–67) that the Commission's order provided relief which was improperly broad in that it requires (1) divestiture of St. Helens' timberlands and (2) the restoration of St. Helens "as a competitive entity in the paper trade, as organized and in substantially the basic operating form it existed at or around the time of acquisition" (R. 604).

These remedial provisions are well within the Commission's "wide discretion in the choice of a remedy deemed adequate to cope with the unlawful practices." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611; *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 396. Restoration of the pre-existing competitive situation by divestiture is the normal remedy for corporate combination which eliminated competition in violation of Section 7, *United States* v. *duPont & Co.*, 366 U.S. 316, 329. It clearly was appropriate to require divestiture of the St. Helens timber holdings

acquired in the merger, along with its plant facilities, for this purpose. Such holdings are an important adjunct to any paper mill. They were St. Helens' insurance against seasonal shortages in the supply of woodchips and fluctuations in the open market price of wood (R. 2022–23). Their retention would, therefore, serve to "enhance the dominant position held by [Crown]" (R. 593) and prevent St. Helens from becoming as strong a competitor as it was before Crown acquired it.

The merger's adverse effect upon competition could be corrected only by recreating competition of the same vigor as that which had been eliminated. Thus, "piecemeal sale" would not reestablish a reliable source of supply for independent converters and jobbers (R. 622). Cf. *Federal Trade Commission* v. *Western Meat Co.*, 272 U.S. 554, 558–560. Moreover, the provision for restoring St. Helens as a competitive entity "substantially as it existed at or around the time of the acquisition" was essential, from the standpoint of a prospective buyer, to the divestiture of an enterprise whose viability had been established by experience. This provision also permitted Crown to propose a plan of divestiture under which it might retain those improvements added by it which are not necessary to St. Helens' operating condition and organization as a competitive entity (R. 621). Crown's objection to the form of divestiture ordered is, in any event, premature since it has not yet filed any plan of divestiture and the Commission has thus not had occasion to interpret its order. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 653–654.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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